contrary, that the Deputy Public Prosecutor must have studied the relevant investigation papers which would conceivably include information from the Chemistry Department though not necessarily in the form of chemist report per se. There is no indication that these same factors were present in *Ho Huan Chong*. That being so, it is hardly surprising that the Court should have taken a more cautious approach in that case.

For the reasons given, I will dismiss this application and confirm the order of the Sessions Court.

LEE PHET BOON

v.

HOCK THAI FINANCE CORPORATION BERHAD

HIGH COURT, MIRI
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING MOTION NO. MR. 9 OF 1993]
23 APRIL 1994

LAND LAW: Section 148 Sarawak Land Code - Order for sale - No bidders - Judge ordering second auction - SAR fixing auction date and reserve price - Application to set aside orders of Judge and SAR or for declaration that orders ultra vires - Whether order for sale pursuant to s. 148 subject to certiorari or declaration - Consideration of O. 15 r. 16 of RHC - Section 14(1) & item 1 of Schedule Courts of Judicature Act 1964.

PRACTICE & PROCEDURE: Originating motion to set aside two orders made in chambers by Judge and SAR concerning sale of land - Alternative prayer for declaration that orders ultra vires, null and void - Defendant raising preliminary objections - Contention that application should be by way of summons and not originating motion - Whether wrong procedure adopted - When originating motion applicable - Consideration of O. 5 rr. 1 & 5, O. 8 r. 3 Rules of the High Court 1980 - Sections 148(2) (c), 150, 151 & 152 Sarawak Land Code.

JURISDICTION: Application to set aside ex parte order of Judge made in chambers - Contention that Court being of co-ordinate jurisdiction had no jurisdiction to deal with the application relating to the order by the Judge as Judge was functus officio - Whether Judge functus officio - Whether present Court had jurisdiction to deal with application - Consideration of O. 28 r. 4(1) & O. 32 r. 6 of the RHC 1980.

ADMINISTRATIVE LAW: Whether certiorari would lie to quash the decision of a Judge of the High Court or other person acting judicially - Whether Judge exercising power under s. 148 of the Sarawak Land Code to make an order for sale of land was acting in quasi judicial or administrative capacity - Whether subject to a writ of certiorari - Consideration of item 1 of Schedule to Courts of Judicature Act 1964 - Section 148 Sarawak Land Code.

ADMINISTRATIVE LAW: Declaration - Whether order by Judge for sale of land pursuant to s. 148 of the Sarawak Land Code was subject to declaration - Whether plaintiff had other remedies in respect of orders made

- Consideration of O. 15 r. 16 & O. 56 RHC 1980 - Sections 14(1) & 68 Courts of Judicature Act 1964.

On 14 March 1988 the Court ordered that the plaintiff's land, the subject matter of a charge be sold by public auction pursuant to s. 148(2)(c) of the Sarawak Land Code (the Code) at the reserve price of RM150,000. There being no bidders the defendant applied for an order for a second auction at a reduced reserve price of RM135,000 which was allowed by the learned Judge on 4 March 1992. On a summons for directions the learned Senior Assistant Registrar (SAR) made an order on 4 March 1993 *inter alia* that the auction sale be held on 12 June 1993 with a reserve price of RM135,000.

The plaintiff applied by way of originating motion for an order that the two orders (the impugned orders) made in chambers by the learned Judge dated 9 March 1992 and by the SAR dated 4 March 1993 be jointly and severally discharged or set aside. In the alternative the plaintiff prayed that the impugned orders be declared *ultra vires* and null and void. The Counsel for the defendant raised preliminary objections at the hearing of the application. Firstly, that the application ought to have been by summons and not motion and secondly, that the Court being of a co-ordinate jurisdiction had no jurisdiction to deal with the application relating to the impugned order by the Judge as he was *functus officio*. In reply to the first contention the plaintiff submitted that his intention in making this application was to commence a new suit pursuant to O. 8 r. 3 of the Rules of the High Court 1980 (RHC).

Held:

[1] From O. 5 r. 5 of the RHC it was clear that originating motion was only to be used when required or authorised by the RHC or by or under any written law, which in this case was the Code. Upon perusing the RHC and the Code the Court could not find any specific rule or section which required or authorised the plaintiff to begin the proceedings by originating motion. The plaintiff had adopted the wrong procedure. Therefore the Court allowed the preliminary objection raised holding that on that ground alone the Court would dismiss the plaintiff's application.

[2] The Court disagreed with submission of Counsel for the defendant that the learned Judge was *functus officio* when he made the impugned order as his order, being made *ex parte*, was not a final order. Under O. 28 r. 4(1) of the RHC the said order "may be varied or revoked by a subsequent order of the Court on such terms as it thinks fit" and under O. 32 r. 6 of the RHC, such an order may be set aside by the Court. There were ample authorities which allowed a Court of co-ordinate jurisdiction to deal with the matter. An application to set aside an *ex parte* order was not an appeal which required a Court of superior jurisdiction to deal with it.

[3] With respect to the alternative prayer for declaration, O. 15 r. 16 of the RHC conferred power to the Court to make declaratory orders and item 1 in the Schedule to the Courts of Judicature Act 1964 (CJA) conferred additional power to the High Court to issue *certiorari*. The issue was whether *certiorari* would lie to quash the decision of a Judge of the High Court or other person acting judicially. Plaintiff's Counsel submitted that when a Judge exercised his power under s. 148 of the Code in making the order for sale of land, he was acting in a quasi judicial or administrative capacity and was therefore amenable to a writ of *certiorari*. In view of s. 148 of the Code, that submission had no merit at all. In the circumstances an order made by a Judge pursuant to the said section was not subject to *certiorari*.

[4] In the proceedings for a declaration the learned Judge and learned SAR were not made parties to the action. Counsel for the defendant submitted that if they so wished they could intervene. The Court saw no merit in this submission and referred to the 1988 **White Book** at page 225 on the scope of O. 15 r. 16 of the RHC, that is, if a prospective defendant was immune from liability in tort, it was not open to a plaintiff who would suffer from his acts to avoid that immunity by the device of framing the proceedings as a claim for a declaration of the plaintiff's rights instead of a direct claim in tort. The Court also referred to s. 14(1) of the CJA which grants immunity to a Judge or other person acting judicially from civil liability for any act done in the discharge of his judicial duty. Therefore it was clear that a declaration would not lie in regard to the two impugned orders. The remedy for the plaintiff lay in an appeal under O. 56 of the RHC or s. 68 of the CJA.

[Plaintiff's application dismissed with costs to the defendant].

Cases referred to:
United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 MLJ 546 ***(cit)***
United Overseas Bank Ltd. [1968] 2 MLJ 85 ***(cit)***
Trawnik v. Ministry of Defence [1984] 2 All ER ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 14(1), 68, item1, Schedule
Rules of the High Court 1980, O. 5 rr. 1 & 5, O. 8 r. 3, O. 28 r. 4(1), O. 32 r. 6, O. 56
Sarawak Land Code (Cap 81), ss. 148(1), (2), 150(1), 151, 152
Rules of the Supreme Court, O. LIII r. 4(1) (Singapore)

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn. p. 143
Rules of the Supreme Court, 1988, p. 225

For the plantiff - Tai Choi Yu; M/s. Tai Choi Yu & Co.
For the defendant - Vincent Y. H. Lu; M/s. Khoo & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
This is an application by the plaintiff by way of a notice of originating motion dated the 24 November 1993 made pursuant to O. 8 r. 3 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") for an order that the two orders made in chambers by Denis Ong Jiew Fook J. dated the 9 March 1992, and by the Senior Assistant Registrar dated the 4 March 1993 in Miri High Court Originating Summons No. MR.46 of 1987 (hereinafter referred to as "the impugned orders") be jointly and severally discharged or set aside. In the alternative, the plaintiff prays for a declaration that the impugned orders are ultra vires and null and void. The grounds given for the application are that the impugned orders:

(1) were beyond the powers and jurisdiction of the learned Judge and Senior Assistant Registrar; and
(2) were not made in accordance with the law and are contrary to and in conflict with the terms and conditions specified in s. 150(1) and s. 152 of the Sarawak Land Code (Cap 81), (hereinafter referred to as "the Code").

On 14 March 1988 the Court ordered that the plaintiff's land the subject matter of a charge be sold by public auction pursuant to s. 148(2)(c) of the Code at the reserve price of RM150,000. There were no bidders. By a summons in chambers dated 19 August 1991, the defendant applied for an order that the plaintiff's said land be again put up for auction at a reduced reserve price of RM135,000 based on a valuation report put up by a private valuer. On 9 March 1992, Ong J. allowed the application and made the 1st impugned order subject to the directions of the Court and s. 151 of the Code. On a summons for directions, the learned Senior Assistant Registrar, on 4 March 1993 made the 2nd impugned order *inter alia*, that the auction sale be held on 12 June 1993 with the reserved price of RM135,000 and that the proceeds of sale be paid into Court and be dealt with in the manner provided in s. 151 of the Code. The two impugned orders were made in the absence of the plaintiff who was duly served with the notice of the proceedings. The auction sale was carried out and the proceeds of the sale was duly deposited in Court. By a summons in chambers dated 14 July 1993, the defendant applied for the payment out of the proceeds of sale and the execution of the memorandum of transfer of the said land under ss. 150 and 151 of the Code. The said application was adjourned to a date to be fixed in the light of the present application of the plaintiff as mentioned above.

At the hearing of the present application of the plaintiff, the learned Counsel for the defendant raised various preliminary objections to the application. Firstly, on the process adopted by the plaintiff in filing this application. It is said that it should be by way of a summons instead of by a motion. He cited the cases of *United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 1 MLJ 546 and *United Overseas Bank Ltd.* [1968] 2 MLJ 85 as authorities in support. In reply, the learned Counsel for the plaintiff submitted that it was so done as the plaintiff is commencing a new suit or action made pursuant to O. 8 r. 3 of the RHC. Thus it is clear that the intention of the plaintiff in making this application is that he is instituting a fresh suit or action against the defendant. He is, therefore, not making an application to set aside an order made *ex parte* pursuant to O. 32 r. 6 of the RHC. The two impugned orders were made in the absence of the plaintiff who was duly served with the process for the hearings. In *United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 1 MLJ 546 Edgar Joseph Jr. J. (as he then was) in overruling the preliminary objection raised, approved the decision of the Singapore Court of Appeal case of *United Overseas Bank Ltd* [1968] 2 MLJ 85 where Chua J. delivering the

judgment of the Court touching on the provision of Order LIII rule 4(1) of the Singapore Rules of the Supreme Court, then in force which generally is in *pari materia* with O. 28 r. 4(1) of the RHC, said:

> It is clear then that a Judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of Order LIII rule 4(1).

To resolve the matter as regards the procedure quarrelled about, one needs to look first at O. 5 r. 5 of the RHC which provides:

> Proceedings may be begun by originating motion or petition **if, but only if,** by these rules or by or under any written law the proceedings in question are required or authorised to be so begun." (emphasis provided).

Thus, from the said order, it is clear that originating motion is only to be used when required or authorised by the RHC or by or under any written law, which in this case is the Code. Perusing the RHC and the Code, I cannot find any specific rule or section which requires or authorises the plaintiff to begin this nature of the proceedings as contained in this application by originating motion. In fact, the Code does not at all prescribe the procedure for commencing an action of this nature. In the principal prayer, the plaintiff prays for the two impugned orders "be jointly and/or severally discharged and/or set aside". In the alternative, the plaintiff prays for a declaration that the two impugned orders are *ultra vires* and null and void.

Order 5 r. 1 of the RHC states:

> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

As mentioned earlier, originating motion not being the required or authorised mode, and the nature of the application is not one to be made by a petition, so what is left is the originating summons or a writ. Since the plaintiff has chosen the originating motion procedure to commence the action, I have no alternative but to agree with the submission of the learned Counsel for the defendant and I accordingly allow the preliminary objection raised and hold that the plaintiff has adopted the wrong procedure to bring his grievances before the Court. On this ground alone, I would dismiss the application of the plaintiff.

The second objection of the defendant is that this Court being of a co-ordinate jurisdiction, has no authority to deal with the application relating to the impugned order made by Ong J. as he is *functus officio*. Bearing in mind the intention of the plaintiff that by this application he is instituting a fresh action, assuming that the procedure he adopted is correct, which I have held as incorrect, I am inclined to disagree with the submission of the learned Counsel for the defendant that the learned Judge was *functus officio* when he made the impugned order

As mentioned earlier, his order is not a final order as it was made *ex parte*. Under O. 28 r. 4(1) the said order "may be varied or revoked by a subsequent order of the Court on such terms as it thinks fit". Under O. 32 r. 6, such an order may be set aside by the Court. There are ample authorities on that which allow the Court of a co-ordinate jurisdiction to deal with the matter. An application to set aside an *ex parte* order is not an appeal which requires a Court of superior jurisdiction to deal with it. This is so in regard to the principal prayer of the plaintiff praying for the discharge or the setting aside of the order. However, as regards the alternative prayer for a declaration of the two impugned orders, O. 15 r. 16 states as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations or right whether or not consequential relief is or could be claimed.

The learned author of **Mallal's Supreme Court Practice,** 2nd Edn. at p. 143 says:

> A declaration can be resorted to ascertain and determine the rights of parties or to determine a point of law or in place of an order of *certiorari*, especially where the time to apply for the prerogative order has expired: *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135 FC.

and item 1 in the Schedule to the Courts of Judicature Act 1964 confers additional power to the High Court to issue *certiorari*. But the main issue is whether *certiorari* would lie to quash the decision of a Judge of the High Court or other person acting judicially? The learned Counsel

for the plaintiff in his submission, says that when a Judge exercising his power under s. 148 of the Code in making the order for sale of land, he is acting in a quasi judicial capacity or in the administrative capacity and therefore is amenable to a writ of *certiorari*. In the light of the provision of s. 148 of the code, that line of submission has no merit at all. The section states:

> 148.(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.
>
> (2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court -
>
> (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;
> (b) to receive the rents and profits of the charged land; or
> (c) for the sale of the charged land,
>
> and the Court after hearing the evidence may make such order as in the circumstances seems just.
>
> (3) (not relevant).

So, the order made by a High Court under the section cannot by any stretch of imagination be treated as an administrative or quasi judicial order. In the circumstances, an order made by a Judge pursuant to the said section is not subject to certiorari. What about a declaration then? In the first place, in this proceedings of the plaintiff for a declaration, the learned Judge and the Senior Assistant Registrar are not made parties to the action. The learned Counsel says if they so wish they can intervene in the proceedings. I see no merit at all in the submission. Be that as it may, according to the 1988 **White Book** at page 225 on the scope of O. 15 r. 16, if a prospective defendant is immune from liability in tort, it is not open to a plaintiff who will suffer from his acts to avoid that immunity by the device of framing the proceedings as a claim for a declaration of the plaintiff's rights instead of a direct claim in tort (see per Sir Robert Megarry VC in *Trawnik v. Ministry of Defence* [1984] 2 All ER 791, page 797). Section 14(1) of the Courts of Judicature Act 1964 states:

> 14.(1) No Judge or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

So, with that it is clear that a declaration will not lie in regard to the two impugned orders made respectively by the learned Judge and the Senior Assistant Registrar. The remedy for the plaintiff in respect of any orders made by the Judge or the Senior Assistant Registrar in the exercise of their judicial powers lies in an appeal as spelt out under O. 56 of the RHC and s. 68 of the Courts of Judicature Act 1964.

In the circumstances, I uphold the preliminary objections of the defendants and accordingly dismiss this application of the plaintiff with costs to the defendant.